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Commissioner of Securities and Insurance

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OFFICE OF THE MONTANA STATE AUDITOR  
COMMISSIONER OF SECURITIES AND INSURANCE

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In the matter of )  
EXPRESS SCRIPTS, INC., EXPRESS )  
SCRIPTS ADMINISTRATORS, LLC, and )  
AETNA HEALTH OF UTAH, INC., )  
formerly known as, ALTIUS )  
HEALTH PLANS, INC., )  
Respondents. )

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CASE NO:

**NOTICE OF PROPOSED AGENCY  
ACTION AND OPPORTUNITY FOR  
HEARING**

TO: AETNA HEALTH OF UTAH, INC.  
f/k/a ALTIUS HEALTH PLANS, INC.  
c/o Catilin Roux-Halloran  
151 Farmington Ave. RW61  
Hartford, CT 06156

EXPRESS SCRIPTS ADMINISTRATORS, LLC  
One Express Way  
Mail Stop HQ2E03  
St. Louis, MO 63121

EXPRESS SCRIPTS, INC.  
c/o Christopher Fisher  
One Express Way  
St. Louis, MO 63121

PLEASE TAKE NOTICE:

The Office of the Montana State Auditor, Commissioner of Securities and Insurance

("CSI"), pursuant to the authority of the Montana Insurance Code ("Code"), Mont. Code Ann. §

33-1-101 et seq., is proposing to the Commissioner of Securities and Insurance, Office of the Montana State Auditor (“Commissioner”), that he take specific action against Express Scripts, Inc. (“ESI”), Express Scripts Administrators, LLC (“ESA”), and Aetna Health of Utah, Inc., formerly known as Altius Health Plans, Inc. (“Aetna”) (collectively “Respondents”), for violations of the Code.

### **REASONS FOR ACTIONS**

There is reasonable belief that the following facts will be proven true and justify disciplinary action against Respondents; including, but not limited to, a fine not to exceed \$25,000 per violation under § 33-1-317, and an additional \$5,000 per violation under § 33-1-318, plus a fine between \$500 and \$1,500 under § 33-17-603(5). The Commissioner has authority to take such action under the provisions of §§ 33-1-311, 33-1-317, 33-1-318, 33-17-602, 33-17-603, and 33-17-1001. Service of process is pursuant to § 33-1-314.

### **ALLEGATIONS OF FACT**

1. ESI is a foreign corporation that acts or has acted as an administrator in the state of Montana pursuant to § 33-17-603.
2. ESA is a foreign limited liability company that acts or has acted as an administrator in the state of Montana pursuant to § 33-17-603.
3. Aetna is a foreign corporation that acts or has acted as an administrator in the state of Montana pursuant to § 33-17-603.
4. ESI held a certificate of registration, pursuant to § 33-17-603, to act as an administrator until December 31, 2012. Thereafter, ESI’s certificate of registration was voluntarily surrendered.
5. ESA holds an active administrator’s certificate of registration pursuant to § 33-17-603.

6. Aetna holds an active administrator's certificate of registration pursuant to § 33-17-603.
7. ESA is a wholly-owned subsidiary of Medco Health Solutions, Inc. Medco Health Solutions, Inc., is a wholly-owned subsidiary of Express Scripts Holding Company.
8. ESI is a wholly-owned subsidiary of Express Scripts Holding Company.
9. On information and belief, ESA does not contract with clients for the performance of administrator duties. Rather, ESA enters into intercompany agreements with Medco Health Solutions, Inc., and ESI for the provision of administrator services. Consequently, ESA does not hold or maintain the written agreements required by § 33-17-602, which requires that a person may not act as an administrator without a written agreement between the administrator and the insurer.
10. Despite not holding a certificate of registration to act as an administrator, on information and belief, ESI enters into written agreements for the provision of administrator services in violation of § 33-17-603, which requires that a person may not act as or represent to the public that the person is an administrator in this state unless the person holds a certificate of registration as an administrator.
11. At all times relevant hereto, Aetna knew or should have known that an administrator is required to have an active certificate of registration, and further, that a person may not act as an administrator without a written agreement between the person and the insurer. §§ 33-17-602 and 33-17-603.
12. On March 26, 2013, the Montana Health Cooperative (hereinafter "MHC") executed an agreement with Aetna, for the provision of administrator services, namely for the administration of pharmacy benefits provided by MHC. This agreement between MHC and Aetna was effective until December 31, 2017.

13. On information and belief, for the duration of the agreement between MHC and Aetna, Aetna subcontracted with ESI to provide administrator services on behalf of MHC. On information and belief, ESI was identified as the “pharmacy benefit administrator” in the MHC and Aetna agreement, and had the responsibility, in whole or in part, to adjust and settle claims related to the pharmacy benefits provided by MHC. This arrangement violated §§ 33-17-602 and 33-17-603, because ESI did not, and does not, hold a certificate of registration to act as an administrator, and further, because there is no written agreement between ESI and MHC.

14. On information and belief, pursuant to intercompany agreements, ESA actually performed the pharmacy benefit administrator services on behalf of MHC governed by a subcontract between Aetna and ESI. This arrangement violated § 33-17-602, because there is no written agreement between ESA and MHC.

15. Given that Aetna knew or should have known that an administrator is required to hold a certificate of registration, and further, that a person may not act as an administrator without a written agreement between the person and the insurer, Aetna either willfully or negligently facilitated violations of §§ 33-17-602 and 33-17-603 by ESI and ESA.

16. ESA filed annual renewal applications to act as an administrator in the state of Montana. As part of the renewal process, ESA was required to identify all insurers for which it provided services in Montana. ESA did not disclose the fact that it was providing administrator services on behalf of MHC on any annual renewal. ESA’s failure to provide complete information in its annual renewal forms violates §§ 33-17-1001(b) and (c).

17. By way of letter dated October 3, 2017, CSI delivered an information request to each Respondent pursuant to §§ 33-1-315 and 33-17-611. These statutes provide that the Commissioner shall have access to an administrator’s books and records for examination, audit,

or inspection. Failure or refusal to produce the information requested by CSI is grounds to suspend, revoke, refuse to renew, or refuse to issue a certificate of registration, pursuant to § 33-17-1001.

18. Each of the Respondents have failed to wholly comply with the October 3, 2017, information request. As a result of the Respondents' failure to wholly comply with the October 3, 2017, information request, CSI has not been able to examine or inspect the written agreements governing the relationships among the Respondents.

### **CONCLUSIONS OF LAW**

1. The Commissioner has jurisdiction over this matter pursuant to §§ 33-1-311, 33-1-317, 33-17-603, and 33-17-1001.
2. The Commissioner administers the Code pursuant to § 33-1-311.
3. "Administrator" means a person who collects charges or premiums from residents of this state in connection with life, disability, property, or casualty insurance or annuities or who adjusts or settles claims on these coverages. § 33-17-102(3)(a).
4. The Respondents are "administrators" for purposes of § 33-17-102(3)(a).
5. "Person" includes, but is not limited to, an individual and a corporation. § 33-2-1101(6).
6. The Respondents are "persons" for purposes of § 33-1-202(3).
7. A person may not act as or represent to the public that the person is an administrator unless the person holds a certificate of registration as an administrator. § 33-17-603.
8. A person who acts as an administrator without a certificate of registration is subject to a fine of not less than \$500 or more than \$1,500. § 33-17-603.
9. A person may not act as an administrator without a written agreement between the person and the insurer. The written agreement must be retained as part of the official records of both the

administrator and the insurer for the duration of the agreement and for 5 years thereafter. § 33-17-602.

10. ESI and ESA violated § 33-17-602 by acting as administrators without a written agreement with MHC.

11. Aetna violated § 33-17-602 by facilitating ESI and ESA's work as administrators without a written agreement with MHC.

12. The Commissioner may, after having conducted a hearing pursuant to § 33-1-701, impose a fine of up to \$25,000 upon a person found to have violated a provision of the Montana Insurance Code. This fine is in addition to all other penalties imposed by the laws of this state and must be collected by the Commissioner in the name of the state of Montana. § 33-1-317.

13. In addition to the fine set forth in § 33-1-317, the Commissioner may impose a fine not to exceed \$5,000 for each violation of the Code. § 33-1-318(3).

14. The Commissioner may suspend, revoke, refuse to renew, or refuse to issue a certificate of registration if an administrator or an applicant has violated or failed to comply with a provision of this code or has violated a rule, subpoena, or order of the Commissioner or of the Commissioner of any other state. § 33-17-1001(c).

15. The Commissioner may suspend, revoke, refuse to renew, or refuse to issue a certificate of registration if an administrator or an applicant has obtained or attempted to obtain a license through misrepresentation or fraud, including but not limited to providing incorrect, misleading, incomplete, or materially untrue information in the license application or in the continuing education affidavit. § 33-17-1001(b).

16. The Commissioner retains the authority to enforce the provisions of and impose any penalty or remedy authorized by the insurance code against any person who is under

investigation for or charged with a violation of the insurance code even if the person's license or registration has been surrendered, suspended, revoked, refused, or denied or has lapsed. § 33-17-1001(3).

17. From March 26, 2013, to December 31, 2017, ESI did not hold a certificate of registration to act as an administrator in accordance with § 33-17-603. Nonetheless, ESI acted as and represented itself to the public as an administrator in violation of the Montana Insurance Code.

18. On information and belief, from March 26, 2013, to December 31, 2017, ESI contracted with Aetna for the provision of administrator services on behalf of MHC in violation of §§ 33-17-602 and 603.

19. From March 26, 2013, to December 31, 2017, ESA acted as an administrator on behalf of MHC without the written agreement required by, and in violation of, § 33-17-602.

20. ESA holds an active certificate of registration to act as an administrator, however, on the renewal applications for its certificate of registration from 2013 through 2017, ESA failed to disclose the fact that it was providing administrator services to MHC. Consequently, ESA obtained a license by providing incorrect, misleading, incomplete, and materially untrue information in violation of §§ 33-17-1001(b) & (c).

21. Neither ESI nor ESA maintained a contract with MHC as required by § 33-17-602, and consequently, neither of the Respondents were authorized to act as an administrator on behalf of MHC from March 26, 2013, to December 31, 2017. Thus, each claim adjusted or settled by the Respondents between March 26, 2013, to December 31, 2017, constitutes a separate violation of the Montana Insurance Code, punishable by a fine of up to \$25,000 pursuant to § 33-1-317, and an additional fine of up to \$5,000 per violation pursuant to § 33-1-318.

22. At all times relevant hereto, the Respondents are or were affiliated persons or entities who, in concert, violated the provisions of §§ 33-17-602, 33-17-603, and 33-17-611.

23. At all times relevant hereto, each Respondent was the principal, agent, servant, employee, or in some other legal relationship to the others, whereby legal liability may be imputed from one party to the other.

24. At all times relevant hereto, the relationship among the Respondents was used as a subterfuge to justify the wrongs and other conduct alleged herein.

### **RELIEF REQUESTED**

WHEREFORE, the CSI seeks the following relief:

1. That the Commissioner fine Respondents in an amount not to exceed \$25,000 for each identifiable violation of the Montana Insurance Code, pursuant to § 33-1-317.
2. That the Commissioner fine Respondents in an amount not to exceed \$5,000 for each identifiable violation of the Montana Insurance Code, pursuant to § 33-1-318.
3. That the Commissioner suspend, revoke, refuse to renew, or refuse to issue the Respondents' certificate of registration to act as an administrator.
4. Such other relief as the Commissioner deems necessary and appropriate.

### **STATEMENT OF RIGHTS**

You are entitled to a hearing to respond to this notice, and to present evidence and arguments on all issues involved in this case. You have a right to be represented by an attorney at any and all stages of this proceeding. You may demand a formal hearing before a hearing examiner appointed by the Commissioner pursuant to the Montana Administrative Procedure Act, § 2-4-601 et seq., including § 2-4-631. If you demand a hearing, you will be given notice of the time, place, and the nature of the hearing.

If you wish to contest the proposed action under the jurisdiction of the Commissioner, you must advise the Commissioner within 21 days of the date you receive this notice. You must advise the Commissioner of your intent to contest the proposed action by **writing** to Derek Oestreicher or Mike Winsor, Office of the Montana State Auditor, Commissioner of Securities and Insurance, 840 Helena Avenue, Helena, Montana 59601. Your letter must clearly state whether you demand a hearing, or whether you waive formal proceedings and, if so, what informal proceedings you prefer for disposition of this case. Pursuant to § 2-4-603(2), you may not request to proceed informally if the action could result in suspension, revocation, or any other adverse action against a professional license. Should you request a hearing on the matters raised in this Notice, a hearing must be held within a reasonable period of time unless by mutual consent of the parties.

You have the right to be accompanied, represented, and advised by counsel. If the counsel you choose has not been admitted to practice law in the state of Montana, he or she must comply with the requirements of *Application of American Smelting and Refining Co.* (1973), 164 Mont. 139, 520 P.2d 103, and *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200.

#### **CONTACT WITH COMMISSIONER'S OFFICE**

If you have questions or wish to discuss this matter, please contact Derek Oestreicher or Mike Winsor, Office of the Montana State Auditor, 840 Helena Avenue, Helena, MT 59601, 406-444-4328. If an attorney represents you, please make any contacts with this office through your attorney.

### **POSSIBILITY OF DEFAULT**

Failure to give notice or to advise of your demand for a hearing or informal procedure within 21 days will result in the entry of a default order imposing the disciplinary sanctions against you without further notice to you, pursuant to Mont. Admin. R. 6.2.101, and the Attorney General's Model Rule 10, Mont. Admin. R. 1.3.214.

DATED this 20<sup>th</sup> day of June, 2018.



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DEREK J. OESTREICH  
Attorney for the Department of Insurance

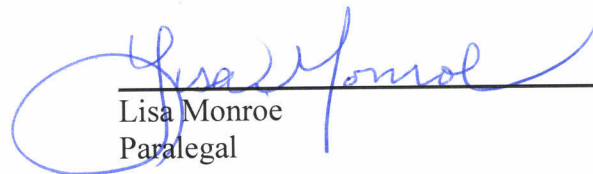
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20<sup>th</sup> day of June, 2018, a true and correct copy of the foregoing Notice of Proposed Agency Action and Opportunity for Hearing was served upon the following by certified mail, postage prepaid, return receipt requested:

AETNA HEALTH OF UTAH, INC.  
f/k/a ALTIUS HEALTH PLANS, INC.  
c/o Catilin Roux-Halloran  
151 Farmington Ave. RW61  
Hartford, CT 06156

EXPRESS SCRIPTS ADMINISTRATORS, LLC  
One Express Way  
Mail Stop HQ2E03  
St. Louis, MO 63121

EXPRESS SCRIPTS, INC.  
c/o Christopher Fisher  
One Express Way  
St. Louis, MO 63121

  
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Lisa Monroe  
Paralegal